No. 90-898

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Petitioners,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, apply to elections for state court judges?

PARTIES

The parties in the court below are as follows:

Plaintiffs: Janice G. Clark, Orscini L. Beard, Eddie G. Crawford, Norbert C. Rayford, Voter Information Project, Inc., Louis Scott, Sylvia Cooks, Connie Sadler, Lloyd Dangerfield, Tom Nelson, Albert Richard, Brenda Ford, Edward Larvadain, and Josie Frank, on behalf of themselves and all others similarly situated.

Plaintiff-Intervenor: The New Orleans Chapter of the Louis A. Martinet Society.

Defendants: Charles "Buddy" Roemer, in his capacity as Governor of Louisiana; Fox McKeithen, in his capacity as Secretary of State of Louisiana; and William Guste, in his capacity as Attorney General of Louisiana.

Defendant-Intervenors: The Louisiana District Judges Association and the Orleans Parish Trial Judges Association.

The plaintiffs in the court below are petitioners in this Court. The defendants and defendant-intervenors in the court below are respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, who are black citizens and voters of the State of Louisiana and plaintiffs in the district court, request that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, before judgment in that court, in order to review the judgment of the United States District Court for the Middle District of Louisiana entered in this proceeding on October 19, 1990.

OPINIONS BELOW

The August 15, 1988 opinion of the United States District Court for the Middle District of Louisiana finding liability under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is reported at 725 F.Supp. 285 (M.D. La. 1988), and is reproduced in the appendix to this petition, p. 1a. The August 31, 1988 order amending the August 15 opinion is also reported at 725 F.Supp. 285 and is contained in the appendix, p. 94a. The June 12,

1990 opinion of the district court modifying its liability findings and outlining the remedy it planned to impose is unreported and is reproduced in the appendix, p. 118a. The October 19, 1990 order of the District Court vacating the previous findings of liability and granting judgment for the defendants on the Section 2 claims is unreported and is reprinted in the appendix, p. 223a. The judgment itself, dated October 19, 1990, is reproduced in the appendix, p. 227a. The district court's opinion of November 2, 1990, explaining its reasons for entering judgment for the defendants and vacating the relief previously granted the plaintiffs, is to be reported but is as yet unreported, and is contained in the appendix, p. 229a.

JURISDICTION

The judgment of the United States District Court for the Middle District of Louisiana was entered on October 19, 1990. The petitioners' notice of appeal from that judgment was filed on October 26, 1990, and an amended notice of appeal was filed on November 6, 1990. The appeal was docketed in the United States Court of Appeals for the Fifth Circuit on November 9, 1990 (No. 90-3785). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which permits certiorari to the courts of appeals "before or after rendition of judgment or decree."

STATUTE INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting, standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title [which applies the Act's protection to members of any language minority], as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

In this case, the district court found a violation of Section 2 of the Voting Rights Act in eleven judicial election districts in Louisiana (ten trial court districts and one intermediate appellate court district), but vacated its finding prior to the actual imposition of a remedy and entered judgment for the defendants because of the intervening decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding that Section 2 does not apply to judicial elections. In the meantime, the Attorney General of the United States objected under Section 5 of the Act, 42 U.S.C. § 1973c, to the at-large method of election of a number of judgeships created in those and other multi-member districts throughout the state, and continued to maintain his objections after the *LULAC* decision. A three-judge district court hearing the Section 5 claims in this case refused to enjoin elections for the unprecleared judgeships, and this Court granted in part an application to enjoin the elections pending appeal. *Clark v. Roemer*, 59 U.S.L.W. 3361 (Nov. 2, 1990, as modified Nov. 5, 1990). Review of the district court's Section 2 judgment is being sought

by this petition for certiorari, while review by direct appeal of the three-judge court's Section 5 ruling is being pursued through a jurisdictional statement that will be filed shortly after the filing of this petition.

Most of Louisiana's trial and intermediate appellate court judges are elected at-large from majority white multi-member districts with designated posts and a majority vote requirement. This case was filed in 1986 by black citizens of Louisiana challenging the election method in those multi-member districts under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution, and challenging a number of unprecleared election changes in those same districts under Section 5 of the Act.[1] The jurisdiction of the district court was invoked under 42 U.S.C. §§ 1973, 1973c, and 1983, and 28 U.S.C. §§ 1331 and 1343(3) and (4). A statewide plaintiff class of black citizens was certified.

This case went to trial on the Section 2 claims in July of 1988. At the time, the governing law in the Fifth Circuit was *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 109 S.Ct. 390 (1988), which held that Section 2 applies to judicial elections. In an opinion issued August 15, 1988 and modified on August 31, the district court in this case, Hon. John V. Parker, found that Section 2 was violated in a large number of Louisiana's trial and appellate court districts. Pet. App. 98a-99a; 725 F.Supp. at 303-304.

In its opinion, the district court carefully examined the extensive evidence adduced at trial and made a number of findings, including the following:

** Across Louisiana and in each of the relevant districts there is what the district court called a "pro-

[1] A separate case, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 109 S.Ct. 390 (1988), challenged a multi-member district used to elect two of the seven members of the Louisiana Supreme Court.

nounced and persistent" pattern of racially polarized voting to such an extent that the white majority has consistently defeated the preferred candidates of choice of minority voters. Pet. App. 63a-64a, 100a; 725 F.Supp. at 298-299, 304.

** Of the 54 black-white judicial election contests held in various parts of Louisiana over the previous ten years, a majority of black voters supported the black candidate in 49 elections, while in *none* of the 54 elections did a majority of white voters support the black candidate. Pet. App. 57a-58a; 725 F.Supp. at 297.

** Only five of the state's 178 district court (trial court) judges is black and only one of the 48 intermediate court of appeal judges is black. Pet. App. 66a; 725 F.Supp. at 299. This is despite the fact that 29.4% of Louisiana's population is black. Pet. App. 24a; 725 F.Supp. at 291. Of those few black citizens who managed to achieve judicial office, most did so by way of appointment to a vacancy and a subsequent unopposed election. Pet. App. 83a; 725 F.Supp. at 302.

** In the areas where violations were found, election lines can be redrawn so that some of the election districts would be majority black. Pet. App. 78a-80a; 725 F.Supp. at 301-302.

** The opportunities of black citizens in Louisiana to participate in the political process are limited by a long history of racial discrimination and pronounced socio-economic disparities between whites and blacks. Pet. App. 45a-47a, 65a; 725 F.Supp. at 295-296, 299.

** Under the current election system, black candidates have a more difficult time raising campaign funds than white candidates. Pet. App. 73a-74a; 725 F.Supp. at 300.

** There is evidence "of both subtle and overt racial appeals" in recent judicial elections in several parts of the state. Pet. App. 65a-66a; 725 F.Supp. at 299.

** Louisiana's requirement of designated posts for judicial candidates hinders black ability to elect candidates of choice from the existing districts. 725 F.Supp. at 301; Pet. App. 75a-76a.

After examining all of these factors as part of what Section 2 calls the "totality of circumstances," the district court concluded that black citizens have less opportunity than other members of the electorate to elect candidates of choice to judgeships in the relevant districts and that Section 2 accordingly is violated.[2]

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[2] A subsequent opinion by the district court spoke dramatically of obstacles faced by highly qualified black judicial candidates unable to compete fairly in majority white districts because of the color of their skin. Of Al Gray, a prominent black lawyer in the Fourteenth Judicial District, the district court wrote:

> He was the first black to run for judicial office in the district and virtually no white lawyer or office holder would publicly endorse his campaign. He was told repeatedly that "Calcasieu Parish is not ready for a black judge," he had great difficulty raising funds, and he had great difficulty placing any yard signs in white areas (only two signs were placed [in white areas] in the entire parish). Mr. Gray campaigned almost exclusively in the white community; he received almost all of the black votes and very few white votes against two white opponents.

Of Sylvia Cooks, a well-known black lawyer, former law clerk to a Justice of the State Supreme Court, and former assistant district attorney in the Fifteenth Judicial District, the district court said:

> Mrs. Cooks had fund raising problems in the white community similar to those of Mr. Gray in the Fourteenth District and similar problems in obtaining public white support. She also testified about the overt and covert racial appeals in both elections by candidates and the public. By all accounts, Mrs. Cooks ran a professional, well organized campaign, using a public relations specialist (who also testified), polls, television, etc. She spent large amounts of her own money. The court can say, without depreciating the qualifications of any of her opponents, that Mrs. Cooks was as least as well qualified professionally as any opponent in either race. As she put it, however, there was nothing that she could do about the color of her skin. There is no doubt that the white majority in the Fifteenth Judicial District voted against her in both races

Responding to an opportunity provided by the district court, the Louisiana legislature designed a potential remedy involving the use of election subdistricts, some of which would have been majority black, and proposed the remedy to the state's voters in a referendum on a state constitutional amendment. However, that referendum was defeated in November of 1989 as the result of white bloc voting. In February of 1990, an evidentiary hearing was held in the district court regarding the appropriate remedy. On June 12, 1990, the district court issued an opinion narrowing its findings of Section 2 violations to eleven districts—ten trial court districts and one appellate court district. Pet. App. 222a. In addition, the district court concluded that the appropriate remedy for those eleven districts would be the creation of election subdistricts, some of which would be majority black and others majority white. *Id.* 218a-219a. The Court did not draw the subdistricts, but asked the parties to attempt to reach agreement on the subdistrict lines. *Id.* 221a.

Before any further remedial proceedings were held, the Fifth Circuit issued its highly divided en banc decision on September 28, 1990 in *LULAC v. Clements*, which involved elections for trial judges in Texas. A majority of seven members of the Court expressed the view, in an opinion by Judge Gee, that Congress' use of the word "representatives" in the 1982 amendment to Section 2 was designed to exclude state court judges from the reach of that provision. Another four judges, in a concurring opinion by Judge Higginbotham, said that Section 2 covers judicial elections and permits challenges to at-large elections for *appellate court* judgeships, but does not permit similar challenges regarding *trial court* judgeships because each trial judge exercises his or her power independently rather than collegially. Chief Judge Clark

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because of the color of her skin and that the bloc vote prevented the black preferred candidates from winning.

June 12, 1990 opinion, Pet. App. 162a, 165a-166a.

issued a concurring opinion for himself stating that Section 2 does not permit a challenge to at-large elections for any judgeship, trial or appellate, where the challenged election district is geographically co-extensive with the area from which the judge normally hears cases, but does permit a challenge where the existing election district is smaller than the area normally served by the judge. Judge Johnson dissented, saying that Section 2 is applicable to discriminatory election systems for all judges, whether trial or appellate. Judge Johnson's dissent called the majority opinion "a burning scar on the flesh of the Voting Rights Act." 914 F.2d at 652 (Johnson, J., dissenting).

In the wake of the *LULAC* decision, the district court in the present case vacated its findings of a Section 2 violation and on October 19, 1990 entered judgment for the defendants on the Section 2 claims. The district court's judgment covered not only the ten trial court districts previously found in violation, but also the one appellate district found in violation—a district that elects some of the judges on one of the intermediate circuit courts of appeal and that is smaller than the area from which those particular appellate judges hear cases.[3] Six members of the en banc Fifth Circuit would have permitted the claim involving that appellate district (the four judges in the Higginbotham opinion, Chief Judge Clark, and Judge Johnson), but seven would not, and the district court accordingly dismissed that Section 2 claim along with the others. Pet. App. 232a.

Meanwhile, as noted earlier, the Attorney General objected under Section 5 to the at-large method of election

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[3] Louisiana is divided into five circuit courts of appeal. Each circuit is divided into smaller districts, most of which are multi-member. Most of the judges on each circuit bench are elected from the smaller districts. At the same time, the judges on each circuit court of appeal hear cases from throughout the circuit. Thus, most of the intermediate appellate court judges are elected from districts smaller than the geographic area from which the judges hear cases.

for several unprecleared judgeships in these same multi-member districts, as well as others in the state, and continued to maintain his objections after *LULAC*. A three-judge court hearing the Section 5 claims in this case refused to enjoin the fall, 1990 elections for the unprecleared judgeships, leading to an application for injunction pending appeal that was granted in part by this Court on November 2, 1990. *Clark v. Roemer*, 59 U.S.L.W. at 3361. A jurisdictional statement in support of the direct appeal from the three-judge court decision will be filed shortly after this petition is filed.[4]

REASONS FOR GRANTING THE WRIT

I. A CONFLICT IN THE CIRCUITS EXISTS REGARDING THE APPLICABILITY OF SECTION 2 TO JUDICIAL ELECTIONS.

The decision of the Fifth Circuit in *LULAC v. Clements*, and the district court's adherence to *LULAC* in the present case, are in direct conflict with the holding of the Sixth Circuit in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). *Mallory* involved a challenge to at-large elections for trial judges in Cincinnati and Hamilton County, Ohio, and the Sixth Circuit held that Section 2 applies to such a challenge.[5]

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[4] The judgment dismissing the Section 2 claims was entered under Rule 54(b), F.R.Civ.P., leaving the Fourteenth and Fifteenth Amendment claims pending in the single-judge district court. The district court previously decided not to resolve the constitutional claims as long as the case could be disposed of on statutory grounds. Pet. App. 37a-38a; 725 F.Supp. at 294. *See, Escambia County v. McMillan*, 466 U.S. 48 (1984) (constitutional claims in voting rights case should not be addressed if the matter can be resolved under Section 2). It will be unnecessary to decide the constitutional issues if this Court overrules the Fifth Circuit and holds that Section 2 is applicable.

[5] The Sixth Circuit's decision in *Mallory* contains a thorough examination of the language, congressional purpose, legislative history, and prior construction of the Voting Rights Act. The points

No other courts of appeals have addressed the issue. The Eleventh Circuit, in a case that did not involve the election of judges, appeared to indicate it would follow the Sixth Circuit rather than the Fifth on this issue when it said: "Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official." *Dillard v. Crenshaw County, Alabama*, 831 F.2d 246, 250 (11th Cir. 1987).

The only district courts outside the Fifth and Sixth Circuits to have ruled on the question concluded that Section 2 governs judicial elections. *Williams v. State Board of Elections*, 696 F.Supp. 1563 (N.D. Ill. 1988); *SCLC v. Siegelman*, 714 F.Supp. 511 (M.D. Ala. 1989); *Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla. July 20, 1990) (denying motion to dismiss). In *SCLC* and *Nipper*, the district courts have been asked by defendants to reconsider their holdings in light of the recent *LULAC* decision, but both have declined to follow *LULAC* and have permitted the Section 2 challenges to go forward. *SCLC*, No. 88-D-0462-N (order of Dec. 5, 1990); *Nipper* (order of Nov. 23, 1990).

II. THIS CASE INVOLVES AN IMPORTANT AND UNSETTLED QUESTION ABOUT THE INTERPRETATION OF THE VOTING RIGHTS ACT THAT SHOULD BE RESOLVED BY THIS COURT.

This Court stated in *Thornburg v. Gingles*, 478 U.S. 30, 43 (1982) that Section 2 "prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or standards, practices, or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a

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made in that discussion demonstrate that Section 2 is applicable and that the decision below in the present case is erroneous. In the interest of brevity in this petition for certiorari, those points are not repeated here.

protected class of racial and language minorities." (Emphasis in original). The Senate Judiciary Committee report accompanying the 1982 amendment of Section 2 said that Section 2 is "*the major* statutory prohibition of *all* voting rights discrimination." S. Rep. No. 417, 97th Cong., 2d Sess. at 30, 1982 U.S. Code Cong. & Admin. News 177, 207 (emphasis added). Clearly, Section 2 is the centerpiece of Congress' statutory effort to eliminate racial discrimination in voting.

Some 40 of the 50 states employ popular elections for some or all of their judgeships. While racial discrimination does not exist in judicial elections in all of those states, nor in all election districts within a given state, the potential for discrimination exists in some states and in some judicial districts. The findings of discrimination by the district court in the present case illustrate that potential.

Given that Section 2 is the centerpiece of the Congressional effort to banish racial discrimination in voting, and given that many states choose judges through the electoral process, it is important for this Court to determine if Congress intended to exclude judicial elections from the reach of Section 2 or if it intended Section 2 to prohibit discrimination in all elections.

The issue of Section 2's applicability to judicial elections has arisen in a number of cases around the country. Challenges under Section 2 to particular election districts for judges have been brought in federal courts within the Fourth, Seventh, Eighth, and Eleventh Circuits, as well as the Fifth and Sixth Circuits.[6] Final

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[6] *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C.); *Williams v. State Board of Elections*, 696 F.Supp. 1563 (N.D. Ill. 1988); *Hunt v. Arkansas*, No. PB-C-89-406 (E.D. Ark.); *Brooks v. State Board of Elections*, No. 288-146 (S.D. Ga.); *Davis v. Martinez*, No. 90-40098 MP (N.D. Fla.); *Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla.); *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.

resolution of Section 2's coverage in pending and future cases requires this Court to grant certiorari on the issue.

Resolution of the issue also is important to eliminate any confusion surrounding the interrelationship of Section 2 and Section 5. The decision below holding Section 2 inapplicable to judicial elections flies in the face of the decisions of this Court holding that Section 5 applies. *Brooks v. Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. December 1, 1989) (three-judge court), *aff'd mem.*, 59 U.S.L.W. 3293 (October 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). *See also*, *Clark v. Roemer*, 59 U.S.L.W. 3361 (Nov. 2, 1990, as modified Nov. 5, 1990) (injunction pending appeal against judicial elections that violate Section 5). The language of Section 5 delineating the scope of that provision ("any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting") is nearly identical to the language of Section 2 describing its coverage ("voting qualification or prerequisite to voting or standard, practice, or procedure"). In light of the identity of language, and the fact that the two sections are companion provisions of the same Act, it is difficult to imagine that Congress intended for one to apply to the election of judges and not the other.

The problem caused by conflicting interpretations of the two provisions is nowhere better illustrated than in the present case. Because of the Fifth Circuit's ruling in *LULAC*, nothing can be done by the federal district court in Louisiana under Section 2 about at-large elections in longstanding multi-member districts it has found to be discriminatory, even though the creation of new at-large judgeships in the same districts is barred by the Attor-

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1988), *cert. denied*, 109 S.Ct. 390 (1988); *Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988).

ney General's Section 5 objections. (A few pre-existing judgeships that never were precleared also are the subject of the Attorney General's objection). This dichotomy shows that the two provisions are not operating in tandem, but instead are being taken in very different directions. Moreover, the conflicting interpretations leave a significant gap, particularly with respect to the discriminatory judgeships in Louisiana that were created prior to the effective date of Section 5 (November 1, 1964) and are now immune from statutory challenge under Section 2.

Indeed, the confusion already has caused a three-judge district court in the Western District of Louisiana to interpret the *LULAC* decision to mean that *Section 5* is inapplicable to voting changes involving the at-large election of judicial officers, *Hunter v. City of Monroe*, No. 90-2031 (W.D. La. Nov. 7, 1990), even though this Court clearly has held to the contrary in *Brooks* and *Haith v. Martin.*

Not only is the Section 2 issue raised by the decision below a matter of public importance, but it is a matter of *imperative* public importance that needs to be resolved quickly. In Louisiana, for instance, the Fifth Circuit's recent action in *LULAC* forced the district court to permit judicial elections to proceed in 1990 (with the exception of races for a few seats enjoined by this Court under Section 5) under the existing system in the districts where the court previously found the system discriminatory. It was 1986 when black citizens filed this case, but their Section 2 claims remain in limbo, derailed by the Fifth Circuit's sudden about-face in *LULAC*. This Court should grant certiorari to resolve this issue at the earliest possible opportunity.

III. CERTIORARI BEFORE JUDGMENT IN THE COURT OF APPEALS IS APPROPRIATE IN THIS CASE.

Certiorari before judgment is appropriate to permit the Section 2 issue in this case to be heard at the same time as the Section 5 issues that will be raised on direct appeal from the three-judge court's decision. *See, New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970) (certiorari granted before judgment so the case could be heard along with related proceedings that had reached the Supreme Court by way of direct appeal from a three-judge district court). *See also, McCulloch v. Marineros de Honduras*, 372 U.S. 10, 12 and n.1 (1963) (certiorari granted before judgment so the matter could be heard with other related cases growing out of the same factual occurrence).

Moreover, given that similar cases raising the Section 2 issue in various factual contexts are now before this Court on petitions for certiorari, *Chisom v. Roemer*, No. 90-757; *Houston Lawyers' Association v. Mattox*, No. 90-813, it would be useful to grant certiorari before judgment to hear the present case along with those cases. This Court occasionally has granted certiorari before judgment in order to hear cases that raise similar or identical issues to other cases accepted by the Court for review. *See, e.g., Taylor v. McElroy*, 360 U.S. 709, 710 (1959); *Brown v. Board of Education*, 344 U.S. 1, 3 (1952); *Porter v. Dicken*, 328 U.S. 252, 254 (1946).

Section II of this petition describes the importance of the issue in this case, the number of cases and jurisdictions that will be affected by resolution of the issue, and the need for expedited resolution. For the reasons given therein, this case involves a question that satisfies Supreme Court Rule 11's requirement of sufficient "imperative public importance" to justify issuance of certiorari before judgment in the Court of Appeals.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the petition for writ of certiorari should be granted.

Respectfully submitted,

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